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In the
Supreme Court of the United States

OCTOBER TERM, 1970

No. [illegible]

CHARLES CLOSE,

PETITIONER,

v.

JOHN W. LEDERLE et al.,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	3
Reasons for Granting the Writ	5
I. The decision below that the first amendment does not fully protect non-verbal artistic expression raises significant and recurring problems involving the extent to which major new forms of expression require constitutional recognition and protection	5
II. The decision below that first amendment protection is lessened by speech in a public place — whereby unwilling listeners may be subjected to, and offended by the message — raises significant and recurring problems cognate to those present in *Cohen v. California*, presently before this Court	9
III. Since the decision of the court of appeals was based upon issues unargued in that court or in the district court, this Court should exercise its supervisory authority to insure that petitioner be accorded full and fair determination of the issues	11
Conclusion	12
Appendix	13
Opinion of Court of Appeals	13
Judgment of Court of Appeals	17
Order of Court, May 22, 1970	18
Opinion of the District Court	19

Page

Judgment of District Court 25
Petition for Rehearing 26
Affidavit 28

Table of Citations

Cases

Baggett v. Bullitt, 377 U.S. 360 (1964) 6
Brandenburg v. Ohio, 395 U.S. 444 (1969) 6
Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1962) 6, 7
Cohen v. California, (U.S. , 1970) 9, 11
Kingsley International Pictures Corp. v. Regents, 360 U.S. 684 (1959) 5
Martin v. Struthers, 319 U.S. 141, 146-7 (1943) 9
N.A.A.C.P. v. Button, 371 U.S. 415 (1963) 6
People v. Collich, 1 Cal. App. 3rd 94, 99, 81 Cal Rptr. 503, 506 (1969) 9, 10
People v. Radich, 26 N.Y. 2d 114, 125-8 6, 8
Public Utilities Commission v. Holland, 343 U.S. 451 (1952) 10
Roth v. United States, 354 U.S. 476 (1957) 6
Saia v. New York, 334 U.S. 558 (1948) 10
Schenck v. United States, 249 U.S. 47 (1919) 6
Shelton v. Tucker, 364 U.S. 479 (1960) 6
Stanley v. Georgia, 394 U.S. 557 (1969) 8
Street v. New York, 394 U.S. 576, 591 (1969) 10
Thornhill v. Alabama, 310 U.S. 88 (1940) 5
Time, Inc. v. Hill, 384 U.S. 374, 388 (1967) 7
Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) 7
United Mine Workers of America v. Illinois Bar Asso-

Statutes

	Page
28 U.S.C. § 1254(1)	2
42 U.S.C. § 1983	5

Constitutional Amendments

United States Constitution	
First Amendment	3, 5, 6, 7, 8, 9, 12
Fourteenth Amendment	3, 5

Miscellaneous

Rules of the Supreme Court of the United States	
Rule No. 19	12
Emerson, Thomas I., *The System of Freedom of Expression*, (Random House, 1970)	7, 8, 11

In the
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No.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Charles Close, petitioner, respectfully prays that a writ of certiorari issue from this Court to review a judgment of the United States Court of Appeals for the First Circuit entered in this proceeding on April 28, 1970.

Opinions Below

The Opinion of the United States Court of Appeals for the First Circuit reversing judgment in favor of petitioner is reported at 424 F.2d 988 and is contained in the appendix hereto. The Opinion of the District Court is reported at 303 F. Supp. 1109 and is contained in the appendix hereto.

Jurisdiction

The judgment of the Court of Appeals for the First Circuit was entered on April 28, 1970. A timely petition for rehearing was denied on May 22, 1970, and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Is Fine Art—in the form of painting, sculpture, and figure studies—a form of "expression" as fully protected as verbal speech by the First Amendment to the United States Constitution?

2. Was the Court of Appeals incorrect in holding that First Amendment protection of artistic exhibitions is diminished and rendered minimal when such exhibitions are held in public hallways of publicly frequented buildings administered by the State?

3. Was the Court of Appeals incorrect in holding that removal by state officers of an art exhibition displayed in a public hallway of a publicly frequented building administered by the State was justified on the ground that such exhibition, though not obscene, in part, offended some passers-by as against the rights of the artist under the First Amendment?

4. Was the Court of Appeals incorrect in holding that the removal of an art exhibition, in its entirety, by state officers from the public hallway of a State University building, without notice to the artist, and without a hearing, on the grounds that some of the artistic renditions were

"inappropriate", but not obscene, did not violate the Due Process Clause of the Fourteenth Amendment and the academic freedom of the faculty-member artist under the First Amendment?

5. Did the Court of Appeals improperly deny a motion for rehearing based upon a claim that its original opinion in the matter was predicated upon arguments not advanced at either the trial or appellate levels and not briefed by either counsel?

Statement of the Case

Charles Close, petitioner herein, was employed as an Instructor of Art by the Department of Art at the University of Massachusetts, the State University of the Commonwealth of Massachusetts, during the academic year 1966-67. Respondents are administrative officers and Trustees of said University.

During the fall of 1966, petitioner was asked by several members of the Department of Art, including its chairman, whether he would prepare a collection of his works, including paintings and figure studies, for display in the public hallway of the Student Union building on the campus of the University. Petitioner agreed to do so.

The Student Union building is located approximately in the center of the campus of the University, in Amherst, Massachusetts. It is open to all students, faculty, and administrative staff of the University as well as to the public at large. Operation of the building is financed by taxes upon the student body of the University. The building is an all-purpose educational and recreational facility. The main floor contains a large auditorium facility, several dining commons, a newspaper stand, and several meeting rooms. Administrative offices and other limited purpose facilities are located on the second floor. For several years

prior to January, 1967, a public hallway or corridor on the main floor was utilized to display artistic exhibitions deemed to be of educational value to students. Both faculty and non-faculty artists had so displayed their creations. The Student Union Governing Board, a body charged by respondents with general supervisory authority over the building, had determined that such use of the hallway was an appropriate educational use and had authorized redecoration and renovation of the hallway to more adequately accommodate artistic exhibitions.

A practice had been established whereby a member (or members) of the Department of Art would be designated to plan artistic exhibitions in the hallway in consultation with a committee appointed by the aforementioned Student Union Governing Board. Pursuant to such arrangement, an exhibition schedule for the 1966-67 academic year, including petitioner's material, was devised and exhibitions, in accordance with said schedule were displayed. None of the respondents were members of any of the aforementioned groups or committees.

Petitioner's display of approximately 31 pieces of art was hung in accordance with the aforementioned schedule and was to remain in the hallway from January 8, 1967 to January 31, 1967. After receipt of some objections to the display, various respondents, including respondent Lederle, President of the University, and respondent Tippo, Provost and chief academic officer of the University, held several meetings to determine the disposition of such complaints. Petitioner was barred from attending those meetings. During the afternoon of January 12, 1967, respondent Lederle determined that the exhibition, *in toto*, was "inappropriate" for display and should be removed. Respondents at all times have conceded that none of the objections were directed toward the entire exhibition and that the exhibition was not obscene, in whole or in part. Pursuant to Lederle's

order, and over the objections of petitioner and the entire Department of Art (except for its chairman), the exhibition was removed that evening.

Petitioner thereupon commenced suit in the Federal District Court for the District of Massachusetts alleging a violation of his rights under the First and Fourteenth Amendments to the United States Constitution and under 42 U.S.C. § 1983 and praying for issuance of an order of mandamus to compel a reinstatement of the exhibition for a period of time equal to that remaining under the terms of the original schedule (19 days) and an injunction to prevent a recurrence of the original removal. Petitioner prevailed in the District Court. The judgment of that court was reversed by the Court of Appeals for the First Circuit on the ground (unargued by either party in either court) that, under these circumstances, petitioner had only a "minimal" First Amendment interest in his exhibition. See pages 15 *et seq.* of the appendix hereto.

Reasons for Granting the Writ

I. The Decision Below That the First Amendment Does Not Fully Protect Non-Verbal Artistic Expression Raises Significant and Recurring Problems Involving the Extent to Which Major New Forms of Expression Require Constitutional Recognition and Protection.

Words are not the only form of communication of ideas and insights and there should be little doubt that the First Amendment protects all forms and media of expression of ideas in an open society. *Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684 (1959); *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Winters v. New York*, 333 U.S. 507 (1948). In the modern world, artistic and other forms of non-verbal expression have come to abet and, some say,

supersede and supplant traditional means of expression. As Chief Judge Fuld of the New York Court of Appeals stated in dissent in *People* v. *Radich*, 26 N.Y. 2d. 114, 127-8 (a case presently on appeal to this Court)

> In our modern age, the medium is very often the message, and the State may not legitimately punish that which would be Constitutionally protected if spoken or drawn, simply because the idea has been expressed, instead, through the medium of sculpture.

In numerous opinions interpreting the First Amendment, this Court has enunciated and developed certain doctrines to limit the ability of the state to abridge verbal speech. Thus, such speech may be abridged only on a showing of "clear and present danger" (*Schenck* v. *United States*, 249 U.S. 47 (1919)) or, under certain circumstances where "incitement" to illegal action is likely to imminently occur (*Brandenburg* v. *Ohio*, 395 U.S. 444 (1969). Where permissible, abridgement must be narrow, specific, limited to circumstances where a legislature could legitimately act and those circumstances must in themselves be clear, limited and precise. *Shelton* v. *Tucker*, 364 U.S. 479 (1960). Even when the legislative goal be legitimate and precisely defined, abridgement of speech may not be countenanced. *N.A.A.C.P.* v. *Button*, 371 U.S. 415 (1963). The doctrines of "vagueness" and "overbreadth" have been developed to insure that restrictions of speech occur in only the most extraordinary of circumstances. *Baggett* v. *Bullitt*, 377 U.S. 360 (1964).

"Artistic expression" not concerning political speech falls within the ambit of the First Amendment. *Roth* v. *United States*, 354 U.S. 476 (1957); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1962). Indeed, the latest major treatise on freedom of speech is entitled, significantly,

"The System of Freedom of *Expression*" (Random House, 1970) author Thomas I. Emerson (emphasis added). Yet, the opinion of the First Circuit clearly delimited the role of the First Amendment by stressing both the non-verbal nature of petitioner's communication and its lack of political content. In holding that political ideas are deserving of greater protection than social or artistic ones—especially by misinterpreting the language of *Burstyn* supra to support its ruling—the Court of Appeals has seriously undermined the ability of artists to communicate their insights. *Burstyn's* recognition that motion pictures "may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression" surely cannot mean that the "range" is one of a declining scale of protection that begins and ends with political thought and forbids protection for both political and social thought and for artistic expression. The latter interpretation has been the unequivocal holding of this Court in numerous cases. *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967) ("Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period"); *United Mine Workers of America v. Illinois Bar Association*, 389 U.S. 217 (1967).

Perhaps the Court of Appeals was influenced by the fact that this Court has never clearly applied the principle of prophylactic protection of artistic expression to purely non-verbal, non-political "speech." The motion picture cases involve a medium of expression verbal in part. In *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) the medium of expression was non-verbal (armbands) but the circumstances clearly de-

monstrated that "political speech" was involved. Thus, the instant case presents the heretofore not fully answered question whether—and to what extent—non-verbal artistic expression concerning non-political subjects is Constitutionally protected.

The issue is clearly a crucial one. To an extent it is presently before the Court in the *Radich* case (involving non-verbal, symbolic political speech). The growth of new forms of communication stressing the non-verbal is the staple of both serious and popular sociological analysis. For numerous reasons, people are turning to artistic and musical communication to discern answers to the questions of personal meaning in their own lives and insights into the nature of Life itself. If the decision herein is not reviewed, then state officials will feel free to utilize vague rubrics such as "embarrassing" and "inappropriate" to abridge vital forms of expression in a manner that would repel this Court if "pure" speech were involved. The right to receive and hold ideas is the essence of free speech and that right often supersedes competing state interests. *Stanley* v. *Georgia*, 394 U.S. 557 (1969). As Professor Emerson has noted in *The System of Freedom of Expression supra* (at 17)

> The root purpose of the First Amendment is to assure an effective system of freedom of expression in a democratic society. . . . The central idea of a system of freedom of expression is that a fundamental distinction must be drawn between conduct which consists of 'expression' and conduct which consists of 'action'. 'Expression' must be freely allowed and encouraged.

In this case the passive expression by means of art (like armbands, akin to "pure speech") was, for no Constitutionally valid reason, disallowed and discouraged. The

meaning of "speech" under modern social conditions should be clarified by this Court to allow the First Amendment to fulfill its high purpose—the preservation of the "Freedom to distribute information to every citizen wherever he desires to receive it. . . ." *Martin* v. *Struthers*, 319 U.S. 141, 146-7 (1943).

II. THE DECISION BELOW THAT FIRST AMENDMENT PROTECTION IS LESSENED BY SPEECH IN A PUBLIC PLACE—WHEREBY UNWILLING LISTENERS MAY BE SUBJECTED TO, AND OFFENDED BY, THE MESSAGE—RAISES SIGNIFICANT AND RECURRING PROBLEMS COGNATE TO THOSE PRESENT IN COHEN V. CALIFORNIA, PRESENTLY BEFORE THIS COURT.

This Court has agreed to hear oral argument in *Cohen* v. *California*, (#1809 Misc., U.S. , 1970), a case involving the question whether the presence of a "captive audience" permits greater latitude in prosecution of the use of vulgar language. Although neither vulgarity (although the Opinion of the Court of Appeals dwells upon a caption of one of petitioner's paintings which, though not vulgar, appears to present a distasteful idea) nor a claim of "political speech" is present here, the same basic issue—abridgement of speech in a (presumed) "captive audience" situation—is present.

Crucial to the holding of the *Cohen* case was the *situs* of the action, a public corridor in a publicly frequented building. The California Court of Appeals said that the epithet on *Cohen's* jacket was "clearly offensive and below the minimum standard of propriety and the accepted norms of public behavior. . . at least when paraded through a courthouse corridor containing women and children" and "He must have been aware that his behavior would vex and annoy a substantial portion of his unwilling 'audience.'" *People* v. *Cohen*, 1 Cal. App. 3rd 94, 99, 81 Cal. Rptr. 503, 506

(1969). Although the language of the Court of Appeals herein differs, its repugnance toward petitioner's "conduct" in a public hallway is equal to that of the California decision.

Although there may well be novel issues where "speech" intrudes upon Privacy, petitioner respectfully submits that the First Circuit's cursory disposition of those issues does not adequately meet the problem of reconciling the two conflicting interests. The opinion failed to distinguish between "at home" privacy and "on the street" (or "on the bus") privacy. See *Public Utilities Commission v. Pollak*, 343 U.S. 451 (1952). On the street privacy is limited and often we become the victims of offensive intrusive and undesired conduct. *Saia v. New York*, 334 U.S. 558 (1948), often the sensibilities of passers by are offended and perhaps shocked; again, competing interests favoring free speech may prevail. In *Street v. New York*, 394 U.S. 576, 594, (1969), this Court found such an interest to supersede "an interest in protecting the sensibilities of passers by who might be shocked. . ." when (at 592)

> "Any shock effect of appellant's speech must be attributed to the content of the ideas expressed. It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.

The First Circuit overlooked several aspects of the problem of "on the street" privacy as distinguished from "at home" privacy, the nature of petitioner's conduct, the lack of any issue of obscenity, the academic environment involved, the nature of the intrusion upon Privacy (visual incursions in a corridor can be more readily escaped than the blaring intrusions of a loud speaker), the number of

people actually offended (very few, apparently), and the passive medium of petitioner's "speech." Professor Emerson *supra* at 558 has noted that

> Invasion [of privacy] by 'expression' is a minor part of the problem. It may be for this reason that the Supreme Court, which has several times touched upon the issues arising from this kind of intrusion, has never formulated any clear-cut doctrine.

The decision to hear *Cohen v. California, supra* indicates that *situs* of speech and invasion of privacy problems may no longer be "minor." In an era where speech is often thrust at unwilling unhearers (though clearly that is not present in this case), those problems are rapidly increasing. Although the issue is perennial—the handbill and streetcorner speaker cases are legion—the context often shifts. If freedom of speech is to be narrowed by the presence of a "captive" or semi-captive audience, then the narrow context of the *Cohen* case is insufficient to provide meaningful guidelines to judges, the police and college administrators. Petitioner respectfully suggests that the instant case is an appropriate vehicle, along with *Cohen*, for the development of alternate jurisprudential doctrines to balance the crucial rights involved.

III.

The position of [illegible] on appeal of this matter was that no free speech rights were involved. Rather, they contended that their administrative powers enabled them to remove insolently and in-

wanted art exhibitions to the same extent that they could act in non Constitutionally protected areas. For that reason, Judge Ford at trial excluded evidence as to the artistic merits of petitioner's works, as to the intent of certain specific paintings, and expert opinion about the subject of nudity in art. Obscenity was never at issue. See appendix at pp. 35 *et seq.*

Petitioner on the other hand took the position that art is a protected form of expression and could only be abridged under limited, exigent circumstances. The trial court agreed with petitioner. See appendix at pp. 19-21.

The Opinion of the Court of Appeals took a middle position that art was "minimally" protected by the First Amendment under the circumstances of this case. See Appendix at pp. 11-15. Petitioners sought a rehearing on the grounds that vital Constitutional issues were in fact created and determined without the benefit of adversary argument by the Court of Appeals and that those issues, though valid ones, would be resolved in petitioner's favor upon rehearing. See Appendix at pp. 31-34. The motion was denied. See Appendix at p. 18. Under Rule 19 of the Rules of this Court, *certiorari* should be granted.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the First Circuit.

Respectfully submitted,

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Counsel for Petitioner

August 18, 1970

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 7477.

CHARLES CLOSE,

PLAINTIFF, APPELLEE,

JOHN W. LEDERLE et al.,

DEFENDANTS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

Walter H. Mayo, III, Assistant Attorney General, with whom *Robert H. Quinn*, Attorney General, was on brief, for appellants.
Isidore Silver for appellee.

April 28, 1970

ALDRICH, *Chief Judge*. Plaintiff, an art instructor at the University of Massachusetts, was asked by a superior if he would care to have an exhibition of his paintings on the walls of a corridor used from time to time for such purposes in the Student Union, a university building. He said that he would. The exhibition, which had been arranged for but not seen by the superior in charge, proved to be controversial. Several administrative meetings were held, attended by the university president, the provost and other officials, and after it had been up for five of the twenty-four

days scheduled, the exhibition was removed. Claiming that this was an invasion of his constitutional rights, plaintiff sued for a mandatory injunction ordering the officials to make the space available for the equivalent of the unexpired periods. The district court, after trial, granted the relief and defendants appeal.

Basically, the district court held that "embarrassment" and "annoyance," causing defendants to conclude that the exhibition was "inappropriate" to the corridor, was insufficient to warrant interference with plaintiff's right of free speech. This holding was not grounded upon a finding that defendants were unreasonable in their opinion. The court refused autoptic profference of the exhibition, apparently taking the position that, at least in the absence of express regulations as to what was impermissible, defendants had no right to censor simply on the basis of offensiveness which fell short of unlawful obscenity.

We disagree. We first consider the nature and quality of plaintiff's interest. Plaintiff makes the bald pronouncement, "Art is as fully protected by the Constitution as political or social speech." It is true that in the course of holding a motion picture entitled to First Amendment protection, we said in *Joseph Burstyn, Inc. v. Wilson*, 1952, 343 U.S. 495, at 501, that moving pictures affect public attitudes

sity of Tennessee, E.D.Tenn., 1969, 300 F.Supp. 777; *Snyder* v. *Board of Trustees*, N.D.Ill., 1968, 286 F.Supp. 927, involve a medium and subject matter entitled to greater protection than plaintiff's art.[1] Even as to verbal communication the extent of the protection may depend upon the subject matter. *See New York Times* v. *Sullivan*, 1964, 376 U.S. 254; *Garrison* v. *Louisiana*, 1964, 379 U.S. 64. We consider plaintiff's constitutional interest minimal.

In this posture we turn to the question whether defendants have demonstrated a sufficient counterinterest to justify their action. The corridor was a passageway, regularly used by the public, including children.[2] Several of the paintings were nudes, male or female, displaying the genitalia in what was described as "clinical detail." A skeleton was fleshed out only in this particular. One painting bore the title, "I'm only 12 and already my mother's lover wants me." Another, "I am the only virgin in my school."

The defendants were entitled to consider the primary use to which the corridor was put. *LeClair* v. *O'Neil*, D.Mass., 1969, 307 F.Supp. 621. See C. A. Wright, The Constitution on the Campus, 22 Vand. L. Rev. 1027, 1040-43 (1969). On the basis of the complaints received, and even without such, defendants were warranted in finding the exhibit inappropriate to that use. Where there was, in effect, a captive audience, defendants had a right to afford protection

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[1] The cited cases all rest to some extent upon principles of [illegible] and obscenity. We may doubt, however, the value of doctrine based on "chilling effect" and prejudice from lack of fair warning when no penalty is involved [illegible] in order to desist. In any event, in the degree to which [illegible] will be required should [illegible] the speech sought to be curtailed. In the present case, [illegible] against offensive exhibitions, and the [illegible] which would be [illegible] on notice [illegible]

[2] While the presence of children might [illegible] we do not deem it necessary to make such a finding [illegible] our decision on broader principles.

against "assault upon individual privacy," *see Redrup v. New York*, 1967, 386 U.S. 767, 769, short of legal obscenity. *Cf.* Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 938 (1963). To quote from Professor Wright, *supra*, at 1058,

> "There are words that are not regarded as obscene, in the constitutional sense, that nevertheless need not be permitted in every context. Words that might properly be employed in a term paper about *Lady Chatterley's Lover* or in a novel submitted in a creative writing course take on a very different coloration if they are bellowed over a loudspeaker at a campus rally or appear prominently on a sign posted on a campus tree."

Freedom of speech must recognize, at least within limits, freedom not to listen.

In hyperconcern with his personal rights plaintiff would not only regard his interest in self expression as more important than the interests of unwilling audience, but asks us to add nearly three weeks of such exposure to the five days he has already received. With all respect to the district court, this is a case that should never have been brought.

Judgment reversed. Complaint dismissed.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 7477.

CHARLES CLOSE,
PLAINTIFF, APPELLEE,
v.
JOHN W. LEDERLE ET AL.,
DEFENDANTS, APPELLANTS.

JUDGMENT
Entered April 28, 1970

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the District Court is vacated and the case is remanded to that Court with direction to dismiss the complaint. Costs to appellants.

By the Court:

(s) DANA H. GALLUP
Clerk

[cc: Messrs. Mayo and Silver.]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 7477.

CHARLES CLOSE,
PLAINTIFF, APPELLEE,
v.
JOHN W. LEDERLE ET AL.,
DEFENDANTS, APPELLANTS.

ORDER OF COURT
Entered May 22, 1970

The petitioner for rehearing in considerable measure repeats what was previously argued; a violation of Local Rule 6. There is nothing embraced in the opinion that is not germane, or inherent in any controversy involving First Amendment rights. The court notes that since the date of the decision the Supreme Court has further recognized that freedom of speech is not a one-sided right. *Rowan v. United States Post Office Department*, U.S. (5-4-70). It finds no reason to change its mind, and sees no occasion for further argument.

The petition is denied.

By the Court:
(s) DANA H. GALLUP
Clerk

[cc: Messrs. Mayo and Silver.]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 67-598-F.

CHARLES CLOSE,

PLAINTIFF,

v.

JOHN W. LEDERLE, President of the University of Massachusetts, OSWALD TIPPO, Provost of the University of Massachusetts, ALEXANDER P. BLASKO, Chief of the Police Department of the University of Massachusetts, and SUSAN DAETCH, as she is Student Chairman of the Student Union Art and Music Committee, FRANK L. BOYDEN, HARRY D. BROWN, EDMUND J. CROCE, DENNIS M. CROWLEY, ROBERT D. GORDON, FRED C. EMERSON, ALFRED L. FRECHETTE, JOHN W. HAGGIS, JR., JOSEPH P. HEALEY, OWEN B. KIERNON, LORENZO D. LAMBSON, LOUIS M. LYONS, JOHN J. MAGINNIS, CHARLES H. MCNAMARA, CALVIN H. PLIMPTON, GEORGE L. PUMPHRET, MRS. GEORGE R. ROWLAND, HARRY C. SOLOMON, HUGH THOMPSON, FREDERICK S. TROY, JOHN A. VOLPE, CHRISTOPHER J. WELDON, Trustees of the University of Massachusetts,

DEFENDANTS.

OPINION

September 10, 1969

FORD, D.J.

Plaintiff in this action is an artist and was formerly an art instructor at the University of Massachusetts. Defendants are the President, Trustees and other officials of the University. The University is a public institution governed

by a Board of Trustees appointed by the governor, and the expenses of the University are paid in substantial part from state funds.

For some time prior to January, 1967, works of art had from time to time been placed on exhibition on the campus of the University and particularly on the walls of the corridor of the Student Union Building. No written rules or regulations governing campus art exhibits had ever been issued by the University. However, an informal procedure had grown up under which a representative of the Student Union and a representative of the Department of Art scheduled exhibitions for the Student Union corridar. Prior to the events involved in this case, at least ten art exhibits had been held in the corridor.

The corridor in question is located on the main floor of the Student Union Building. This building operates to provide educational, recreational and dining facilities for students. Its operating expenses are met by funds derived from fees paid by the students. Its day to day activities are supervised by a governing board of students, faculty, administrators and alumni, approved by the President of the University and operating subject to his general supervisory authority.

The corridor in question was used daily by many students, faculty members and administrators, especially by those going to the dining facilities in the building. It was also frequently used by members of the general public, including some children, attending lectures and other activities open to persons outside the university community. The corridor had been redesigned for the specific purpose of displaying exhibits of art.

In the spring of 1966 Professor Norton, the chairman of the Department of Art at the University asked plaintiff, then an art instructor, if he would be interested in scheduling an exhibition of his work. Plaintiff said he would, and

eventually, under the informal procedure described above, it was agreed that an exhibition of plaintiff's works would be hung in the Student Union corridor from January 8 to January 31, 1967. An exhibition of 31 works was put in place under plaintiff's supervision on the evening of January 7.

This exhibit consisted of 31 pieces. Some were completed major works, others were preliminary drawings or studies for these works, included for educational purposes.

Certain of these paintings showing nude or partially nude figures and scenes of bathrooms, as well as certain captions on pictures characterized as depicting campus life, immediately produced discussion and controversy. Several meetings for discussion of the exhibit were held in which several university officials took part including the President, the Dean, the Secretary, the Provost, and on some occasions the Chairman of the Art Department. Plaintiff was not present at these discussions, although on at least one occasion he was sitting outside the meeting room, but was not invited to come inside.

Finally at a meeting on Thursday, January 12, it was decided to remove the exhibition. On that evening the paintings were taken from the walls by employees of the University. Plaintiff was given no notice that this was to be done. His paintings were returned to him several days later.

Plaintiff brings this action for a declaration that the removal of his paintings deprived him of his rights under the First and Fourteenth Amendments and for an order that defendants be required to reinstate his exhibition for a time equivalent to the number of days by which his scheduled exhibition period was cut short. (Except for two paintings which have been destroyed, the other items of the exhibition are still in plaintiff's possession or are available to him if the exhibition is to be reinstated.)

The University is an instrumentality of the Commonwealth of Massachusetts and its administrators and trustees in actions taken in their official capacity are subject to the restrictions of the Fourteenth Amendment.

The expression of plaintiff's thoughts through the medium of his paintings and the exhibition of them is a form of "speech" within the protection of the Fourteenth Amendment as it incorporates the First Amendment. *Roth v. United States*, 354 U.S. 476, 487, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495.

Plaintiff, of course, makes no contention that he is entitled to hang his paintings anywhere on University property at any time he wishes, or even that the University was required to provide any facilities for the exhibition of works of art. In the present case the University had adopted the policy of allowing such exhibitions. It had provided an area open to the public, and had moreover taken steps to adapt this area for that particular purpose. Plaintiff had fully complied with the procedure for scheduling a time for his exhibition and the works had been placed on display. In these circumstances, the court agrees with plaintiff that his right to maintain his exhibitions for the scheduled period came within the protection of the First and Fourteenth Amendments. Thereafter defendants could terminate the exhibition and remove his paintings only in accordance with regulations narrowly drawn to serve the legitimate interests of the University. *Wolin v. Port of New York Authority*, 392 F.2d 83, *East Meadow Community Concerts Association v. Board of Education*, 18 N.Y. 2d 129; *Dauskin v. San Diego Unified School District*, 171 F.2d 885. Having chosen to permit and even to encourage expression in the form of exhibitions of art, the University cannot by arbitrary or discriminatory action bar plaintiff from exhibiting his work for the period to which

under the existing procedure he had become entitled to do so. *Brooks v. Auburn University*, 296 F. Supp. 188.

In January, 1967, of course, the University had no regulations under which an exhibition could be terminated. It is not necessary, however, in this case to hold that in the absence of such regulations the University could not under any circumstances terminate an exhibition of art. The court will assume that even without such regulations the University could have terminated the exhibition if there existed any grounds sufficient to justify under the Constitution such a restraint of plaintiff's freedom of expression. No such grounds can be found in this case.

There was nothing in the evidence to show that the continuance of the exhibition for the scheduled period would have in any way resulted in any substantial interference with any legitimate interest of the University. At most the exhibition seems to have displeased some persons who saw it, and to have given rise to some lively discussion. There was some vague evidence of a few complaints made to officials of the University. There was also evidence of one anonymous threat to damage the paintings, and evidence that one of the paintings had been stolen.[1] There was nothing to indicate any possibility of disorder or of interruption of the University's activities. At most the exhibition was a source of some annoyance or embarrassment, but this is far from providing adequate justification for infringement of plaintiff's constitutional right to free [illegible] *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503; *Hammond v. South Carolina* [illegible]

There seems to have been no formal finding or statement by the defendants as to the reason why the paintings were

[1] Security guards were available and could be assigned to protect the exhibition, as had been done on earlier occasions when thefts of works [illegible] had been reported.

removed. From the evidence it appears only that the officers who decided that they should be removed were agreed that this should be done because the paintings were "inappropriate". It needs no discussion to find that mere "inappropriateness" not further explained or defined is far too vague a standard on which to base any limitation of freedom of expression.

The conclusion must be that the removal of plaintiff's paintings from exhibition was a denial of his right to freedom of expression in violation of the Fourteenth Amendment as it incorporates the First Amendment.

An order will issue directing the defendants to permit plaintiff to reinstate his paintings for exhibition in the area from which they were removed, said exhibition to continue for the number of days remaining of the time originally scheduled for the exhibition in 1967. If parties cannot agree on the exact time or other details of the reinstatement, the court on proper motion will issue a further order determining such details.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
Civil Action No. 67-598-F

CHARLES CLOSE

v.

JOHN W. LEDERLE ET AL.

JUDGMENT

FORD D.J.

After trial without jury, and in accordance with the Opinion of this Court dated September 10, 1969, it is

ORDERED that judgment be and hereby is entered for the plaintiff, Charles Close, directing the defendants to permit the plaintiff to reinstate his paintings for exhibition in the area from which they were removed, said exhibition to continue for the number of days remaining of the time originally scheduled for the exhibition in 1967.

By the Court
(s) AUSTIN W. JOHN, JR.
Deputy Clerk

(s) FRANCIS W. FORD
United States District Judge
Sept. 25, 1969

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 747

CHARLES CLOSE,
PLAINTIFF, APPELLEE

v.

JOHN W. LEDERLE, ET AL.,
DEFENDANTS, APPELLANTS.

PETITION FOR REHEARING

Now comes the petitioner-plaintiff and says that he commenced this action against defendants for declaratory and injunctive relief to require said defendants to permit re-exhibition of certain works of art created by petitioner, which works of art had been removed by defendants arbitrarily and capriciously and in violation of plaintiff's rights of free speech and equal protection of the laws under the First and Fourteenth Amendments to the United States Constitution.

And your petitioner says that said lawsuit was heard and decided in petitioner's favor by the District Court for the District of Massachusetts, Ford, J. and that defendants duly refused to reinstate such art exhibition, which order was stayed pending appeal to the First Circuit.

And your petitioner says that briefs were submitted by counsel and oral argument on said appeal was duly made on the fourth day of March, 1970.

And your petitioner says that this Court reversed the judgment entered by the District Court by Order dated April 28, 1970 vacating said District Court order and remanding the matter to said District Court with directions

to dismiss the complaint herein and that said Order was accompanied by an Opinion of this Court setting forth the reasons for its determination.

And your petitioner says that said Opinion is premised upon certain legal arguments not found in the briefs of either party to this appeal and not orally argued to this Court and that such arguments are of Constitutional dimension so significant that re-argument — with full briefs — is necessary for a just disposition of this matter.

Wherefore your petitioner makes application that this Honorable Court order a rehearing of this matter so that full argument may be allowed or that, in the alternative, it remand the matter to the District Court for a new trial, said trial to occur within the framework of the legal issues created in said Opinion, a copy of which is annexed hereto as Exhibit A and that all proceedings in this matter be stayed until the determination of either a rehearing in this Court or a new trial.

CHARLES CLOSE
By his attorney,
(s) ISIDORE SILVER
ISIDORE SILVER

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 7477

CHARLES CLOSE,
PLAINTIFF-PETITIONER

v.

JOHN W. LEDERLE, et al.,
DEFENDANTS-RESPONDENTS

COMMONWEALTH OF MASSACHUSETTS)
) ss.:
COUNTY OF SUFFOLK)

ISIDORE SILVER, being duly sworn, deposes and says that:

1. I am the attorney for plaintiff-petitioner in the above entitled matter and am personally familiar with all of the circumstances hereon.

2. This action was commenced to compel defendants to reinstate a certain art exhibition—consisting of approximately 31 pieces of art—removed by defendants prior to the scheduled closing date of such exhibition on the stated grounds that the exhibition was "inappropriate" for viewing at the Student Union of the University of Massachusetts. Plaintiff's claim was bottomed upon a violation of his rights of free speech, equal protection of the laws, and due process of law under the First and Fourteenth Amendments to the United States Constitution.

3. At the trial of this matter before Judge Ford of the District Court, District of Massachusetts, everyone on both sides of the case agreed upon certain essential facts: they were

a. Plaintiff, a faculty member in the Department of Art at said University of Massachusetts, had complied with all of the known, extant procedures for exhibition of his works of art, prior to January 5, 1967.

b. The corridor of the Student Union, a public building located approximately in the middle of the University campus, had for at least two years prior to the date of plaintiff's exhibition been utilized for other art exhibitions. The corridor in question was lengthy and was divided by a path which crossed it, in an east-west direction (the corridor itself ran north and south), which path led to a large room called the Student Union Ballroom. Said ballroom was the locus of various events to which the public was generally invited.

c. Judge Ford found that the corridor had been adapted for the showing of art works by various improvements made upon it by officials and employees of the Student Union, and this fact was not contested in this action.

d. Plaintiff's exhibition was scheduled to be shown for a period commencing January 8 (the exhibition appears to have been hung on January 5) 1967 and terminating on January 31, 1967.

e. After the receipt of several complaints some of the defendants, administrative officers of the University of —meetings from which plaintiff was pointedly excluded— determined to remove the exhibition in its entirety during the evening of January 12, 1967.

f. Although there had been some discussion at the various meetings of the theft of one painting and a threat to the exhibition as a whole, the importance of these factors was down-graded in both the opinions of the District Court and the Circuit Court, and will not be further alluded to in this affidavit.

g. Removal of the exhibition was ordered by defendant Lederle on the ground that it was "inappropriate" for the place in which it had been scheduled to hang. The "inappropriateness" was related to certain depictions of nudity in *some* of the paintings and sculptures and to certain language contained in the captions to them and to others.

h. Admittedly, not all of the works exhibited were "inappropriate" by the vague standards utilized by defendants; several of these apparently appropriate works of art are reproduced as part of plaintiff's exhibit two to the appendix on appeal. Defendant Tippo, the only defendant to testify in this matter (indeed the only witness adduced by defendants), stated that he had viewed the exhibit "as a whole" although it was clear that the art works had been placed along the corridor and not in any order. He was unable to say just how many, or approximately how many, of the exhibited pieces were deemed "inappropriate" by himself or by the other defendants.

i. Said exhibition was removed in its entirety by order of defendants sometime during the evening of January 12, 1967.

4. Judge Ford ruled that said removal violated plaintiff-petitioner's rights under the First and Fourteenth Amendments to the United States Constitution, since no Constitutionally adequate standards by which free speech could be suppressed were met.

5. The Court is in possession of the Appendix of this case and the briefs of both parties and is familiar with the aforementioned recitals.

6. The only argument raised by appellant related to a vague and sweeping assertion of the powers of defendants as custodians of University property to determine the uses to which such property should be put. As attorney for respondent (now petitioner) I confined my brief to an analysis of the pertinent case law holding that such power

is subject to Constitutional limitation and that generally Art is protected as Speech under the First Amendment so that any limitation upon speech was required to meet Constitutional standards relating to specificity and narrowness.

7. In its opinion of April 28, 1970 this Court raised and determined an issue not analyzed in either brief—the issue whether Art as a form of speech is deserving of as much Constitutional protection as "pure" speech, especially in the circumstances disclosed herein. As the Court said, "Cases dealing with students' rights to hear possibly unpopular speakers. . .involve a medium and subject matter entitled to greater protection than plaintiff's art." It concluded "We consider plaintiff's constitutional interest minimal."

8. Whatever the justification for the above characterization, plaintiff has never had his day in Court—and never will, under the Order in this case—on that issue. Although this is an inappropriate time to litigate that crucial question (for it goes to the nature of Art and Art forms, such as motion pictures and whether speech which is obviously political is deserving of greater protection than the "truths" embodied in those forms), perhaps a few observations are in order. When the Supreme Court said, in *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 501 (1952) that motion pictures affect public attitudes in ways ranging "from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression," affiant is not convinced that "this statement in itself recognizes that there are degrees of speech," as this Court noted. I would be grateful for the opportunity to argue that such an interpretation may well be unwarranted, especially in light of *Winters* v. *New York*, 333 U.S. 507 and *Kingsley International Pictures Corp.* v. *Regents*, 360 U.S. 684 (1959). In *Kingsley*, the Court took

issue with the majority opinion of the New York Court of Appeals and especially with the statement that "Precedent, just as sound principle, will not support a statement that motion pictures must be 'out and out' obscene before they may be censored" (*supra* at 686 fn. 7). Since Kingsley expressly refused to rule whether motion pictures should be treated differently from print ("Nor need we here determine whether, despite problems peculiar to motion pictures, the controls which a State may impose upon this medium of expression are precisely coexistent with those allowable for newspapers, books, or individual speech", *supra* at 689-90) this Court should not take that lengthy step without the benefit of full argument.

9. Another vital Constitutional point was made in the opinion; it concerns the latitude given to administrative officials where "there was, in effect, a captive audience"; again, the placement of plaintiff's art works may well determine the extent of his Constitutional rights, but, again, that vital point has not been briefed or argued by the parties to the case. Indeed, even if the authority condoned by the Court herein be ultimately upheld as far as plaintiff is concerned, it may be far too sweeping in other conceivable cases. Judge Aldrich stated in *LeClair* v. *O'Neil*, 307 F. Supp. 621, 625-6 (cited by the Court herein):

> Since the purpose of permitting a party, not himself engaged in Constitutionally protected conduct, to attack a Statute is to remove the chilling effect for the benefit of others, the standard should be set by the reason itself: do the overall circumstances reasonably suggest that regardless of whether the plaintiff's particular conduct was Constitutionally privileged, privileged conduct would not be exempted from prosecution?

The dangers of vagueness and overbreadth inherent in a standard of "inappropriateness," whenever controversial

art is involved, may well give the plaintiff-petitioner herein standing to contest such a standard. Again, affiant would welcome the opportunity to litigate that issue.

10. Clearly, the "assault upon individual privacy" argument of *Redrup v. New York*, 386 U.S. 767, 769 discussed in the Court's opinion herein is a legitimate argument to be raised and fully analyzed by counsel. For the moment, affiant would merely state that *Redrup's* brief allusion to such an assault ("in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it") cannot justify—without greater detail—the leap from the statement to the Court's conclusion that such, in fact, occurred here. *Redrup* itself only cited *Public Utilities Commission* v. *Pollak*, 343 U.S. 451 (wherein such an "assault" was sustained) and *Breard* v. *Alexandria*, 34 U.S. 622 which involved a prohibition on solicitation upon private premises (and wherein the Supreme Court said of the First Amendment argument that "Only the press or oral advocates of ideas could urge this point. It was not open to the solicitation for gadgets or brushes" *supra* at 641); perhaps the reach of *Redrup* should extend to the instant matter, but there may be important distinctions between privacy in a public place and at-home privacy which may be controlling. The law review citations contained in the Court's opinion may well create a form of "variable obscenity" for the Court to consider but surely they do not stand for the authority that *anyone* feeling shocked at an occurrence in a public place can demand that State officers terminate the cause of such shock. Professor Emerson's comment that "Regulations can be devised to deal with this matter ("assault on the other person") that do not create serious administrative problems" 72 Yale L. Journal at 938-9; those regulations to be Constitutionally allowable might well permit the removal of offensive—if such there be—Art; they cannot sanction

wholesale removal of clearly inoffensive Art-Speech. Again, the issue is certainly a worthy one, and, in fairness, an opportunity to argue it should have been—or should now be—afforded.

11. The Court's evident attitude of disdain for plaintiff himself is to be found in language such as "In hyper-concern with his personal rights plaintiff. . .asks us to add nearly three weeks of such exposure to the five days he has already received. With all respect to the district court, this is a case that should never have been brought." Although the issue of motive is not entirely irrelevant to this matter, perhaps an off the record comment would be relevant since affiant participated in negotiations with defendants prior to the commencement of this suit and was present on campus throughout the period in question. This suit was not commenced as the result of plaintiff's selfishness. Plaintiff moved to New York while the litigation was pending; he has gone on to achieve a certain amount of fame and renown as an artist. He travelled at his own expense to both a pre-trial examination of the major parties involved in the litigation and to the District Court in Massachusetts to appear for trial. Many of the art works involved herein are scattered throughout the country and it would be a burdensome inconvenience to recover them for any new exhibition, but plaintiff has always indicated his willingness to do so. On behalf of the Hampshire County Chapter of the Civil Liberties Union of Massachusetts, I and several others met several times with plaintiff to discuss the importance of this case for what we conceived to be academic and artistic freedom. We—and this included plaintiff and affiant—concluded that the suit should be brought "on principle" and in behalf of those numerous students and faculty who felt deprived of their rights to view plaintiff's artistic accomplishments and to derive whatever insights they may from them. There was con-

siderable agitation on the University of Massachusetts campus over defendant's treatment of plaintiff. Plaintiff's exhibit one of the Appendix to this case indicates the depth of feeling within the Department of Art; one of defendants' exhibits is a communication from the appropriate Student Union body establishing new standards for review of art and hoping that such will end administrative interference in decision making where administrators are not competent to make such decisions.

12. The only reason why plaintiff sued was because of our (the Civil Liberties Union's) belief that he was the appropriate party. In the cases cited by the Court relating to students' rights to hear controversial speakers, the decisions held that such rights were derived from the speakers' right of free speech. To transmute a tactical decision to put plaintiff's name on the complaint into a selfish hyperconcern with his own rights is unwarranted. At rehearing or new trial—if such should be ordered by the Court—we shall present evidence of considerable student shock at the administrative action undertaken herein.

13. Throughout the trial, Judge Ford refused to receive evidence that plaintiff was a serious artist; all parties assumed that. Judge Ford also refused to receive evidence about obscenity since that was not in issue—again, both parties agreed that the art works were not legally obscene. Judge Ford also refused to receive evidence that other art exhibitions containing nudity were not interfered with by defendants on the ground of irrelevancy. What to defendant Tippo was "clinical detail" may have been mere nudity to others, and the painting of Bob Dylan with its vaguely outlined genital area is before this Court.

14. As Professor Wright said in the article referred to in the Court's opinion, "The average University student is more than 21 years old and is surely an adult." 22

Vand. L. Rev. 1027, 1052-3. There is no question that plaintiff was not "pandering" to younger people—indeed that he was pandering at all. To find, in the absence of full argument, that no due process violation occurred here, deprives the Court of the opportunity to carefully analyze the 14th Amendment in this unique context. As Justice Frankfurter said in concurring in *Kingsley Pictures Corp.* v. *Regents supra* at 697

> It is the nature of the concept of due process, and, I venture to believe, its high serviceability in our constitutional scheme, that the judicial enforcement of the Due Process clause is the very antithesis of a Procrustean rule. This was recognized in the first full-dress discussion of the Due Process Clause of the Fourteenth Amendment, when the Court defined the nature of the problem as a "gradual process of judicial inclusion and exclusion, as the cases presented for decision may require with the reasons on which such decision may be founded." *Davidson* v. *New Orleans*, 96 U.S. 97, 105. The task is onerous and exacting, demanding as it does the utmost discipline in objectivity, the severest control of personal predilections. But it cannot be escaped, not even by disavowing that such is the nature of our task.

15. In the Opinion in this case, the Court stated that "the degree to which specificity will be required should correspond to the importance of the speech interest asserted," again, perhaps a truism, but certainly a doctrine to be fully explored. This Court has recognized that non-political speech containing some nudity in the form of a theater presentation is worthy of substantial Constitutional protection. *K.P.I.C., Inc. et al* v. *Byrne*, —— F. 2d. —— (May 6, 1970). It takes no extended argument—certainly not at this stage—to support the proposition that speech should be deprived of Constitutional protection only under

the most limited and carefully defined circumstances and that distinctions among forms of "pure" speech are generally disfavored. Although affiant cannot predict the outcome of reargument herein, I would sincerely attempt to convince the Court that "the subtle shaping of thought which characterizes all artistic expression" is an important rationale warranting more sensitive and more discriminating treatment than defendants demonstrated herein.

WHEREFORE, deponent urges that this Court grant reargument and rehearing to the within matter and stay its mandate pending such reargument or make such other order which is fair and just under the circumstances.

(s) ISIDORE SILVER
ISIDORE SILVER

Sworn to before me this
12th day of May, 1970
(s) JOHN G. MITCHELL
Notary Public
My Commission Expires April 14, 1972